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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HEATHER GUSSMAN,

Plaintiff and Respondent,

v.

RICHARD ENGLISH,

Defendant and Appellant.

B200327

(Los Angeles County
Super. Ct. No. SS015497)

APPEAL from an order of the Superior Court of Los Angeles County, Jacqueline A. Connor, Judge. Affirmed.

Greines, Martin, Stein & Richland, Cynthia Tobisman and Shelia A. Wirkus for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Richard English challenges the sufficiency of the evidence supporting an injunction obtained by Heather Gussman (respondent) prohibiting him from harassing her. He also argues the trial court incorrectly concluded that the injunction should not make any difference to him. We affirm because appellant failed to provide an adequate record on appeal to allow us to review his claim of insufficiency of the evidence.

FACTUAL AND PROCEDURAL SUMMARY

In April 2004, respondent Heather Gussman's neighbor, Robin Strasser, asked respondent to obtain a bid to redo the bathroom floor and shower wall tiles on a rental property owned by Strasser. Appellant was visiting from Georgia and staying with his friend, respondent. Respondent asked appellant, an experienced handyman and expert tile layer, to make a bid on the job. She called Strasser in New York and relayed appellant's bid of \$1,500 for labor and materials for the job, which appellant said could be done in three days. Strasser accepted the bid. Respondent took appellant to purchase materials for the job on May 3, 2004. On May 5, tenants agreed to rent the property after appellant assured them that the work would be finished within three days.

After a week, appellant said he found severe water and termite damage that would take additional time and materials to repair. Strasser was contacted and approved a new price of \$2,200 for the work. In an affidavit respondent filed in support of her application for the civil harassment injunction, she explained how the situation deteriorated: "As the job inexplicably took longer and longer (approximately four to five weeks), [appellant] was heard by the Tenants, Todd [appellant's] helper and myself, that he underbid the job and was working for charity. With this, [appellant] changed his demands to wanting \$100.00 [a] day for the work, stating that, 'That is what handymen are paid.' When I disagreed and refused, he became very angry and verbally abusive. I asked him to leave both [Strasser's] property and my home. When he finally did I discovered all the power tools and receipts for all the materials that I had paid for were gone. A police report was filed with the West Los Angeles Police Department, . . . Between the agreement for the final figure of \$2200.00 and the last day [appellant] was in my home, I tried to hurry him

along, and I was constantly apologizing to the tenants for the unexplained delays. At no time did [appellant] ask for more money or express that he wished to contact [Strasser], nor did I try to contact her.”

In support of her application for the injunction, respondent detailed her efforts to remove appellant from her home in May 2004. Appellant told her she would have to make him leave. Respondent said appellant was one foot, three inches taller than she, and weighed 120 pounds more, so she could not make him leave. She telephoned the police, who refused to intervene. According to respondent, appellant eventually returned to Georgia. At the end of June 2004, respondent received a copy of a small claims action filed by appellant against Strasser.¹ That action was dismissed when appellant failed to appear for the hearing. He also failed to appear for the hearing on his motion to reinstate that action.

Respondent said: “Beginning September, 2005, I started receiving threatening messages from Mr. English, ‘warning me that he would be back, he would in fact re-file a Law Suit, ruin my life and my carer [*sic*], that he was never, ever going away, he would be back in California soon enough, and continue suing myself and Robin Strasser for the rest of his life to make me miserable.’ He also said, ‘Everyone hates you, Heather you are going to pay, you are going to be sorry, I am going to ruin your life, I am going to sue you over & over, just to make your life a living hell. ha ha ha.’” On August 4, 2005, respondent was served with another suit, but appellant failed to appear for the hearing and the case was dismissed without prejudice.

No contact was reported between August 2005 and June 2007. Respondent said: “June 1, 2007, I received a harassing message from Mr. English letting me know, ‘that the statute of limitations was about to run out, did I want to pay him the money I owed him, before he re-filed his law suit.’ June 3, 2007, I received yet another nasty harassing & threatening message stating he re-filed.”

¹

The record is unclear as to whether respondent was named as a defendant in that action.

On June 5, 2007, respondent filed a request for orders to stop harassment by appellant. She asked for a temporary restraining order because, she claimed, appellant is a convicted felon, extremely volatile, with a history of violence. Respondent said appellant had “threatened my life, career, future, and friends in the past. He has filed multiple fraudulent Small Claim Law Suits against me for the same claim, only never to show up in court, and stating how he loves wasting my time, ruining my day and life.” The request was supported by a narrative statement and affidavit in which respondent detailed the \$1,800 she had spent on the materials and labor for the repairs to the Strasser house.

The court issued a notice of hearing and temporary restraining order. Appellant filed an answer to the request for orders to stop harassment. He did not agree to the orders requested and argued that respondent had not suffered emotional distress because he had made a lawful attempt to collect a debt. He also said that the small claim form required him to attempt to collect payment before filing an action. He claimed out-of-pocket expenses for the loss of a day’s earnings and travel in the amount of \$210.

The trial court heard the matter on June 21, 2007. The court noted that the dispute appeared to date back to 2004 or 2005 and asked respondent why she was in court now. Respondent said: “I was just handed this second a third small claim for the same suit which he’s been attempting to pursue and not showing up in court for moneys that he claims were owed to him, which I guess the suit’s sort of moot at any rate because he’s not a licensed contractor and was trying to sue for money --.” The court interjected, saying it did not need to hear about that. Respondent continued: “I’m here because of being harassed via voicemail and the now third suit for the same claim, which he twice did not show up for. It’s just frivolous lawsuits over and over, and --.” Once again, the court interrupted and said: “I can’t stop him from filing lawsuits. That has to be done in the courtroom in which it’s filed. So what are you asking for?”

Respondent said she was in court because appellant’s telephone messages started again in 2007. She related the first call on June 1, 2007: “The statute of limitations is about to run out,’ do I want to give him money before he goes and refiles it again.”

Respondent clarified that appellant said: “Do I want to give him the money I owe him and that I’m a crook and I cheat everyone and, you know, do I want to give him the money that I owe him, blah, blah, blah. He’s going to file the lawsuit.” She described the second message, on June 3, 2007: “Telling me he wasn’t calling to talk about the weather, blah, blah, blah; that, you know, he’s trying to get the money that I robbed him of or owe him. Allegedly owe him.” There were no further messages. Respondent explained that there had been no messages between June 2005 and June 1, 2007, and said that she thought appellant had been incarcerated during that period. The court reiterated that it could not order appellant to refrain from filing small claims actions because that request would have to be handled in small claims court. Respondent clarified that she wanted to stop appellant from any kind of communication with her.

Appellant said his only contact with respondent was regarding the tile job he did for her next door neighbor. He said: “The SC-130 form, paragraph 4, says, quote, ‘You must ask the defendant in person, writing or by phone to pay you before you have sued. Have you done this?’ I checked the box ‘Yes.’ That’s all I did. I asked for my money before filing suit. The statute was ready to toll, and, you know, I said, ‘What’s the disposition of this file? Do you want to settle or do I have to file? I in fact filed. She’s been served here today in court.’”

Recordings respondent made of appellant’s 2007 voice messages were played in court but not transcribed. No written transcript of the recordings was offered as an exhibit. After the first message was played, respondent said she found it very harassing. Appellant said he left the messages because respondent would not take his calls. Respondent said she never intentionally avoided his calls, and that she had other messages from 2004 when appellant is laughing and going on about how he was going to ruin her life, and how this was fun for him. The court said that it did not want to hear evidence about events from 2004. When respondent said the series of events led up to the recent calls, the court observed that it was a history but not a series. When respondent again referred to the calls appellant made in 2004, appellant objected and said

he did not have any way to rebut a three-year-old message. The court told him to be quiet.

The court asked appellant whether he was in custody in 2005 or 2006. He responded: “I may well have been.” He told the court he was released on August 30, 2006 following a bench trial in which he was acquitted of all charges. Respondent argued that one message from appellant requesting payment was sufficient and he should not call again. She said the second message was very harassing and upsetting. Appellant said he just wanted to be paid for the tile job, and that respondent’s request was in retaliation for his lawsuit.

The court ruled: “Mr. English, I’m going to sign this order. It shouldn’t make any difference to you. . . . Just don’t make any more phone calls, no contacts. Stay 100 yards away unless you’re in court. And the judge will make a decision on the small claims action. To the extent that someone claims or there’s a defense allegation that you didn’t make that request, you can show them the restraining order, and it will protect you.” Appellant said he had not had contact with respondent in three years. The court replied: “The fact that you had these two contacts, you don’t need to have any more contacts. . . .” After an interruption by appellant, the court told appellant that he was barred from making more phone calls since he had satisfied the small claims court requirement.

Appellant asked why he needed judicial interference in his life when he agreed not to call respondent. The court explained that respondent did not believe him, and said it was not sure it believed him either. The court said the restraining order was for three years. The court issued a restraining order for three years prohibiting appellant from harassing or contacting respondent. He was ordered to stay at least 100 yards away from respondent or her car, except for court appearances. This timely appeal followed. Respondent did not file a brief on appeal.

DISCUSSION

Code of Civil Procedure section 527.6² sets out the requirements and procedures for a civil injunction against harassment: “(a) A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an injunction prohibiting harassment as provided in this section.” Subdivision (b) of section 527.6 defines “harassment” as: “unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff.” “Unlawful violence” and “credible threat of violence” are defined in section 527.6, subdivision (b)(1) and (2). The evidence presented at trial does not fit within those categories of harassment.

The remaining category of harassment under section 527.6 is “course of conduct” which is defined as “a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail. Constitutionally protected activity is not included within the meaning of ‘course of conduct.’” (§ 527.6, subd. (b)(3).)

The trial court must find by “clear and convincing evidence that unlawful harassment exists” before an injunction may issue prohibiting the harassment. (§ 527.6, subd. (d).) “Where the trial court has determined that a party has met the ‘clear and convincing’ burden, that heavy evidentiary standard then disappears. ‘On appeal, the usual rule of conflicting evidence is applied, giving full effect to the respondent’s evidence, however slight, and disregarding appellant’s evidence, however strong.

²

Statutory references are to the Code of Civil Procedure.

[Citation.]” (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1111, fn. 2.) We review a trial court’s decision to grant an injunction for abuse of discretion. In order to determine whether the trial court abused its discretion, we review its findings under the substantial evidence standard. (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912; *Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.)

Section 527.6 “was designed to provide a quick and simple procedure by which this type of wholly unjustifiable conduct, having no proper purpose, could be enjoined. The statute is limited to protecting only those who have suffered ‘substantial emotional distress’ caused by conduct ‘which serves no legitimate purpose.’ (§ 527.6, subd. (b) defining ‘harassment.’)” (*Byers v. Cathcart* (1997) 57 Cal.App.4th 805, 811.)

It is apparent that the trial court issued the injunction based only on the evidence of the calls made by appellant in 2007, without relying on the 2004 and 2005 communications. Our review of the evidence is hampered by the lack of a reporter’s transcript of the tape recordings of the two 2007 telephone calls. We have only respondent’s description of the content of the calls, which we have summarized. ““A judgment or order of the [trial] court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent” (Orig. italics.) [Citation.]’ (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.) It is the appellant’s affirmative duty to show error by an adequate record. (*Erikson v. Sullivan* (1947) 81 Cal.App.2d 790, 791.) ‘A necessary corollary to this rule [is] that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed.’ (*Uniroyal Chemical Co. v. American Vanguard Corp.* (1988) 203 Cal.App.3d 285, 302.)” (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.)

Appellant could have sought to obtain an agreed or settled statement of the recorded telephone calls which were heard by the trial court but not transcribed by the reporter. (Cal. Rules of Court, rules 8.130(g) and 8.137(2)(B).) Because he failed to

furnish an adequate record of the evidence against him, his claim of insufficiency of the evidence must be resolved against him. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.)

DISPOSITION

The permanent injunction against appellant under section 527.6 is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.